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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 654

AETNA CASUALTY & SURETY CO.

and

McCLOSKEY ENTERPRISES, INC., *Petitioners,*

v.

MADGE VINSON, ET AL., *Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

M. S. MAZZUCHI, Esq.
405 Investment Building
Washington 5, D. C.
*Attorney for Petitioners*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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### PETITION

The petitioners, Aetna Casualty & Surety Co., and McCloskey Enterprises, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on June 14, 1962.

## OPINIONS BELOW

The United States District Court for the District of Columbia Circuit did not render an opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit has not been reported as yet, but is set forth in full and attached hereto as "Appendix A."

## JURISDICTION

The judgment of the Court of Appeals was entered in the above-entitled cause of action on June 14, 1962. The jurisdiction of this Court is invoked by reason of Title 28 U.S.C. Section 1254 (1).

## QUESTIONS PRESENTED

The questions present for review are:

1. Is a reviewing court bound by the findings of fact of a Deputy Commissioner if said findings are supported by substantial evidence considering the record as a whole.

2. Does a reviewing court have the power to make its own findings of fact de novo.

## STATUTE INVOLVED

Sections 919 and 921 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C., Sections 919 and 921) provide in pertinent parts as follows:

> SEC. 919. Procedure in Respect of Claims
>
> (c) The Deputy Commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a

hearing thereon. If a hearing on such claim is ordered the Deputy Commissioner shall . . . after hearing is had, by order, reject the claim or make an award in respect of the claim. . . .

(d) At such hearing the claimant and the employer may each present evidence in respect of such claim and . . .

SEC. 921. Review of Compensation Order

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the Deputy Commissioner making the order and instituted in the Federal district court for the judicial district in which the injury occurred. . . .

## STATEMENT OF THE CASE

This cause arose upon a complaint to the United States District Court for the District of Columbia Circuit to review and set aside as not in accordance with law a compensation order filed on December 14, 1960, by Charles Einbinder, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, in which order the Deputy Commissioner rejected the claim for compensation (death benefits) filed by the respondents. The Deputy Commissioner rejected such claim for the reason that the death of Henry A. Vinson (employee) did not result from an injury which arose out of and in the course of his employment.

The said order was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 United States Code, Sections 901 et seq., as made

applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, District of Columbia Code 36-501.

The United States District Court for the District of Columbia Circuit, upon a review of the record, granted the Deputy Commissioner's and the petitioners motion for summary judgment and dismissed the complaint without opinion.

Thereafter an appeal was filed by the respondents to the United States Court of Appeals for the District of Columbia Circuit. A division of that court consisting of three judges reversed the decision of the District Court.

The petitioners thereupon filed a petition for rehearing by the United States Court of Appeals for the District of Columbia Circuit sitting en banc. On September 12, 1962, by order of that Court said petition was denied. Four judges of that Court voted to grant the petition for rehearing en banc.

## REASONS FOR GRANTING THIS WRIT

The issues involved in this case are of great public importance because they are determinative of substantial rights of parties to a great bulk of litigation in the District of Columbia and elsewhere in the United States. A great deal of confusion and uncertainty has arisen because of the tenor of the decision of the Court in this case. The Court seemingly invades the province of the fact-finding function of the Deputy Commissioner. The action of the appellate court in this case is arbitrary and unreasonable in the light of previous expressions of this Court in similar cases. The Supreme Court of the United States has on occasions too numerous to enumerate clearly enunciated

the limited function of the reviewing courts regarding the findings of fact of an administrative officer. It is submitted by the petitioners herein that the action of the Appellate Court in the instant case represents a flagrant invasion of the fact-finding function of the administrative officer to whom Congress has delegated this authority. *Administrative Procedures Act,* 60 Stat. 237, 5 U.S.C. 1001, et seq.

## ARGUMENT

The action of the U. S. Court of Appeals for the District of Columbia Circuit represents a serious invasion of the functions of an administrative body which was established by Congress for the specific purpose of acting as a fact-finding body. The Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C., Sec. 901, et seq., as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, D. C. Code 36-501, contains and sets forth the duties of Deputy Commissioners with respect to claims filed under said Act. The Supreme Court in *Crowell* v. *Benson,* 285 U.S. 22, said in construing this act: ". . . there can be no doubt that the Act contemplates that, as to questions of fact arising with respect to injuries to employees within the purview of the act, the findings of the Deputy Commissioner, supported by evidence and within the scope of his authority shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."

There have been many decisions of the Supreme Court since that time which have explained and interpreted the respective functions of the Deputy Commissioner and the reviewing Court in these cases. As stated by the Supreme Court in *Del Vecchio* v. *Bowers*, reported at 296 U. S. 280: ". . . the issue must be resolved upon the whole body of proof pro and con; and if it permits an inference either way . . ., the Deputy Commissioner and he alone is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the Court." "If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing Court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the Court because of a belief that the one chosen by the Deputy Commissioner is factually questionable." See *Cardillo* v. *Liberty Mutual*, 330 U. S. 469. The United States Court of Appeals for the District of Columbia Circuit has even gone so far as to say that "The Deputy Commissioner is not required to disclose his reasoning process in reaching a conclusion. . . ." See *Vendemia* v. *Cristaldi*, 221 F. 2d 103. It is clear then that the United States Court of Appeals for the District of Columbia Circuit is limited in its review in the instant case to a determination of whether the Deputy Commissioner's findings are supported by substantial evidence upon the record considered as a whole. The findings of fact of the Deputy Commissioner are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504; *Voris* v. *Eikel*, 346 U. S. 328. Even if the

evidence permits conflicting inferences, the inference drawn by the Deputy Commissioner is not subject to review and will not be reweighed. *Del Vecchio* v. *Bowers*, 296 U. S. 280; *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469. The scope of judicial review is as stated by this Court in *O'Leary* v. *Brown-Pacific Maxon*, supra:

> "... The standard, therefore, is that discussed in Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 71 S. Ct. 456. It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole ...
>
> "... We do not mean that the evidence compelled this inference; we do not suggest that had the Deputy Commissioner decided against the claimant, a court would have been justified in disturbing his conclusion. ..."

Similarly with reference to the inferences drawn by a Deputy Commissioner, the Supreme Court in *Cardillo* v. *Liberty Mutual Ins. Co.*, supra, said:

> "In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one

is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable.

". . . It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court."

Under such interpretations of the Longshoremen's Act by the Supreme Court of the United States and the Court of Appeals for the District of Columbia (*U. S. Fidelity & Guaranty Co.* v. *Britton*, 88 U. S. App. D. C. 293, 188 F. 2d 674; *General Accident Fire & Life Assurance Corp.* v. *Britton*, 103 U. S. App. D. C. 135, 255 F. 2d 544; *Liberty Mutual Ins. Co.* v. *Britton*, 100 U. S. App. D. C. 236, 243 F. 2d 659), a court may not set aside a compensation order unless, on the whole record, the Deputy Commissioner was "compelled" to make findings, draw inferences and arrive at conclusions different from those set forth in the compensation order complained of.

It is respectfully submitted by the petitioners that the action of the U. S. Court of Appeals for the District of Columbia Circuit in the instant case represents a flagrant invasion of the fact finding function of an administrative body. While it payed lip service to its limited function the Court proceeded to review the facts de novo and then in total disregared of all of the facts on record it proceeded to highlight only those facts which it considered favorable to the appellants' cause. The reviewing Court even substituted its own recollection of some personal unrelated steering dif-

ficulty with an automobile without power steering for specific evidence in the record concerning the amount of force required to steer the vehicle which plays an important part in this case. The employer produced moving pictures in the trial of this case in order to demonstrate the force required to steer this vehicle. Your petitioners made a proffer to show these motion pictures to the reviewing Court if the Court deemed it necessary. The movies showing the operation of this vehicle and the testimony of George P. Diederick, Jr., a crane operator for 20 years, who testified among other things (T. 118) ". . . that the rig drives more or less like a big truck and does not require any extraordinary strength to operate" seems to have been completely ignored by the reviewing Court. Likewise this man's statement that he saw the employee from time to time operating said rig and never noticed him having any trouble driving it (T. 128) or that he saw the employee whom he knew very well driving the rig and he never complained about it being too hard to drive (T. 120, 128-129) as well as the testimony of Howard F. Massey, general superintendent of the employer, who had been in construction business for 35 years and who was well acquainted with the type of vehicle under discussion, that the rig the employee had been driving was no more difficult to manage than any other manually steered truck (T. 141-144), or his comments regarding the rig in question while viewing the moving pictures showing the facility with which the rig could be steered, was with the same ease discarded by the Court in arriving at its conclusion concerning the facts. It is apparent that the Deputy Commissioner had ample evidence upon which to base his findings of fact. We are, of course, completely in the dark as to his reasoning process. It was solely

within the province of the Deputy Commissioner, as the trier of the facts, to determine the credibility of witnesses; he could disbelieve any part or all of the evidence presented according to his judgment of its truthfulness and reliability. *Kwasizur* v. *Cardillo*, 175 F. 2d 235; *Gooding* v. *Willard*, 209 F. 2d 913. We can only surmise that the Deputy Commissioner did not feel that the testimony of the witnesses presented by the employee was worthy of belief. It was within his province and his alone to determine which witnesses to believe and which not to believe. It may be significant that there is not one word of testimony to the effect that the decedent complained to any other employee that the work of steering the vehicle in question was too difficult for him on the day of his death.

The U. S. Court of Appeals for the District of Columbia Circuit seems to lay great stress upon the fact that the employee was "maneuvering and backing into a very tight and difficult spot" when he died. There was no such finding by the Deputy Commissioner who heard the testimony and saw the witnesses in person and who reviewed the entire record prior to issuing his decision. There is absolutely no evidence in the record of testimony taken before the Deputy Commissioner in this case that the employee was engaged in any activity when he died. The testimony is that the employee was found dead in the cab of the rig while it was standing still. This is one of the esssential weaknesses in the employee's case. There was no proof of injury.

It should be noted that judicial review of a rejection of a claim involves a somewhat different viewing of the evidence from review of an award of compensation. In the latter case there must be affirmative evidence in the record to support the award; in the former,

affirmative evidence is not needed to support the denial of compensation, since, upon failure of a claimant to carry the burden of proof in support of his claim, the claim must be rejected notwithstanding the absence of affirmative evidence to disprove the claim. In other words, it is not necessary for the employer to prove a negative, *Gooding* v. *Willard*, 209 F. 2d 913; *Kwasizur* v. *Cardillo*, 175 F. 2d 235. The rejection follows the claimant's failure to establish his claim. In the Gooding case, the Court of Appeals said:

> "We might let decision turn on the above, but it should also be noted that the burden to show that the accident was a contributing cause of the death was on the appellee. It is obvious, of course, that in point of fact it either was or was not a contributing cause. However, in point of proof of causal connection, the conclusion of the trial judge that the finding of no causal connection was inadequately supported by the evidence leaves the appellee's burden undischarged. The finding of no causal connection went unnecessarily far in positive terms, but whether or not it went unjustifiably far on the evidence, it was at least an expression of the determination of the Commissioner that the evidence was short to show affirmatively a causal connection between the accident and the death. It is abundantly clear that the evidence on the subject was so conflicting that the Commissioner could reasonably have found that there was no preponderance in favor of the appellee. As no more was needed to support his decision, it was error to set it aside."

In view of the evidence presented in contradiction to the plaintiff's claim that the employee's death not only arose in the course of but also out of the employment, as outlined earlier herein, it would seem that the Deputy Commissioner's rejection of the claim was

supported by substantial evidence in the record as a whole. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504.

If the decision of the United States Court of Appeals for the District of Columbia Circuit in this case is allowed to stand, it is respectfully submitted by the petitioners herein that the fact-finding powers of the Deputy Commissioner have been rendered nugatory. His function and office would be completely emasculated.

## CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

M. S. MAZZUCHI
405 Investment Building
Washington 5, D. C.
*Attorney for Petitioners*

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit were mailed, postage prepaid, this 11th day of December, 1962, to the office of David Acheson, Esq., United States Attorney, United States Court House, Washington, D. C., Herbert Miller, Esq., Assistant Solicitor of Labor, U. S. Department of Labor, Washington, D. C., and to Martin E. Gerel, Esq., 925-15th Street, N.W., Washington, D. C., attorney for respondents.

M. S. MAZZUCHI

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16582

MADGE VINSON, surviving wife, ET AL., *Appellants*

v.

CHARLES EINBINDER, Deputy Commissioner, Bureau of Employees' Compensation, ET AL., *Appellees*

Appeal from the United States District Court for the District of Columbia

Decided June 14, 1962.

*Mr. Martin E. Gerel*, with whom *Messrs. Lee C. Ashcraft* and *Joseph H. Koonz, Jr.*, were on the brief, for appellants.

*Mr. Herbert P. Miller*, Assistant Solicitor, Department of Labor, with whom *Messrs. Charles Donahue*, Solicitor, Department of Labor, *David C. Acheson*, United States Attorney, and *Nathan J. Paulson*, Assistant United States Attorney, were on the brief, for appellee Einbinder.

*Mr. M. S. Mazzuchi* for appellees Aetna Casualty & Surety Company and McCloskey Enterprises, Inc.

Before EDGERTON, BAZELON and WASHINGTON, *Circuit Judges*.

EDGERTON, *Circuit Judge:* This is a workman's compensation case. 44 STAT. 1424, 33 U.S.C. § 901; 45 STAT. 600, D.C.Code § 36-501 (1961).

On July 7, 1959, Henry Vinson was "driving and backing" his employer's truck "in various positions", on the

construction site of a new House Office building, when he slumped over in the cab of the truck and died instantly of coronary insufficiency and coronary sclerosis. He had been driving and occasionally backing for 1½ to 2½ hours. A crane was mounted on the truck. The weight of the whole was about 68,000 pounds (34 tons). The truck did not have power steering.

Though the work Vinson was doing when he died was, as the Deputy Commissioner found, a normal part of his job, the Deputy Commissioner denied compensation to Vinson's widow and children. He found that Vinson "was not subjected to heavy physical strain" and that death "did not result from injury arising out of and in the course of the employment". There is no substantial support in the record for these findings. The District Court therefore erred in granting summary judgment for the appellees in this suit by the appellants to set aside the order denying compensation.

"Our task is to ascertain whether the Deputy Commissioner's findings are supported by substantial evidence upon the record considered as a whole . . . The reviewing court will not sustain the administrative findings merely because they are substantiated by some isolated evidence. Our review must also take account of the settled rule that the Act is to be construed with a view to its beneficent purposes. Doubts, including the factual, are to be resolved in favor of the employee or his dependent family." *Friend* v. *Britton*, 95 U.S.App.D.C. 139, 141, 220 F.2d 820, 822.

Anyone who distinctly remembers turning and backing an ordinary car, without power steering, when the car was moving slowly, knows it was hard work. Obviously it would have been harder if the car had weighed 34 tons. If there were no evidence in the present record that driving and backing 34 tons of truck and crane, without power steering, on a construction site, was strenuous work, we might per-

haps take judicial notice of the fact. But there is ample evidence.

A fellow employee of Vinson testified that moving the steering wheel of the truck was "hard labor . . . very hard. A hard maneuver. . . .I know of many times I reached up and actually helped him pull the wheel around." A heavy "counterweight" was usually over the rear wheels of the truck but was over the front wheels when Vinson died. The operator of the crane on the truck testified that this position of the counterweight made steering hard for the truck driver and that sometimes "it would take two people [to] turn the wheel. . . . When you make a tight turn you need all the help you can get." A foreman testified that when Vinson died he was "maneuvering and backing in to a very tight and difficult spot." The fellow employee had suggested to Vinson that he "get a lighter job . . . because it was just too much for a man his age and it took a young man with a lot of muscle power to drive it." He made this suggestion "watching him sweat and try to turn that rig around, trying to get it back into places and stuff like that . . . . Because I seen it was hard work for him." Vinson himself had talked about getting an easier job "because it was pretty hard to steer, especially in that particular position." Shortly before Vinson died, as on earlier occasions, he had been helped in turning the wheel. There is no suggestion he was being helped when he died.

A witness who succeeded Vinson as operator of the truck testified that it was "quite hard" to steer and that he needed help a "number of times". He undertook to explain this by saying that "with the anchor bolts in the positions that they were in accordance with the H beams, you have to back in between the H beams and the anchor bolts being in the way, . . . you have to stop, turn the wheel while sitting still, which is a lot harder to steer than it is if you are moving, and to miss these anchor bolts, you have to move the wheel as far as possible to

clear these bolts and to get back in between the H beams. And it is quite a strain."[1]

One witness who had operated a similar "rig" but not this one thought "extraordinary strength" was not required. Another such witness thought this truck was no more difficult to manage than any other truck with manual steering but "all truck driving is a manual operation and it is hard work".

Dr. Ethridge, a specialist in cardiology, concluded from the autopsy report that Vinson had a pre-existing arteriosclerosis. He thought the work Vinson "was performing was competent to precipitate, to accelerate an arteriosclerotic condition to the point where it causes death from coronary insufficiency, secondary to sclerosis." "Strenuous physical effort" could, and probably did, cause Vinson's death. Sometimes, this exertion, physical exertion, causes no difficulty and other times it could cause either death or a heart attack . . . and it is often very difficult to know why on a particular day a certain degree of effort produces a lot of trouble—I mean, patients end up in the hospital because they have difficulty or even die, and on another day seemingly might have done something similar without difficulty."

Dr. Walsh, another specialist in cardiology, gave it as his "conclusion that there was no evidence that there was a relationship between his work and his death", but he based this conclusion on a belief that there was no "definite evidence . . . as to whether this man at the time that he died was engaged in extra strenuous activity . . . ." No one who knew the record could have entertained such a belief. He recognized that if "one was doing something very strenuous, something unusual, then we would say, or I would say it was probably that there was a relationship

[1] As this witness was the last, the medical witnesses did not have the benefit of his testimony.

between actually an individual's sudden death due to acute coronary insufficiency and this unusual effort." He recognized that "Certainly the job must have been at times strenuous if it took two men to turn the wheel of the truck. That would be obvious to everyone." Since Vinson was "maneuvering and backing in to a very tight and difficult spot" when he died, it seems clear that this was one of the times when his job was very strenuous. He was doing alone the sort of thing it sometimes took two men to do.

The judgment is reversed and the case remanded for further proceedings consistent with this opinion.

*Reversed and remanded.*

# BRIEF IN OPPOSITION TO PETITION FOR WRIT

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MARTIN E. GEREL
925-15th Street, N. W.
Washington 5, D. C.
*Attorney for Respondents*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### OPINIONS BELOW

The opinion and judgment in the United States Court of Appeals for the District of Columbia Circuit have not yet been officially reported. The unofficial report is found in 307 F. 2d 387 (Appendix A).

## JURISDICTION

The judgment of the Appeals Court was entered on June 14, 1962. A Petition for Rehearing En Banc was denied En Banc, September 12, 1962. The Petition for a Writ of Certiorari to this Honorable Court was filed December 11, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

## STATUTE INVOLVED

The following provision of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq.*) is applicable:

> Presumptions
>
> Section 920. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of this Act. * * *

## QUESTION PRESENTED

1. Where the record as a whole contains substantial evidence to support a finding in favor of a widow's claim, can a deputy commissioner deny the claim based on some isolated evidence?

## STATEMENT OF THE CASE

This is a case involving the death of Henry Vinson, in the cab of a truck crane, while employed as an oiler at a construction site in Washington, D. C.

On July 7, 1959, at approximately 10 a.m., Henry Vinson, husband and father of the respondents, was employed as an oiler for the McCloskey Enterprises, Inc.,

at the construction site of the newest House Office Building. On the date indicated, Mr. Vinson suffered a heart attack and died in the cab of a truck crane while in the course of his employment.

After a hearing before Charles Einbinder, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, an order was entered denying the claim for death benefits filed by the respondents. The rejection of the claim by the Deputy Commissioner was primarily based on a finding of fact that the employee was not subject to heavy strain during the period immediately prior to his death and consequently that the death of the employee, Mr. Vinson, was not caused by an injury arising out of and in the course of employment.

An action to set aside the rejection of the death benefits claim was filed on behalf of Madge Vinson and her minor daughters. In response, the Department of Labor, on behalf of the Deputy Commissioner, filed a motion for summary judgment as did the petitioners. After hearing oral argument, the United States District Court for the District of Columbia granted the motion and the complaint was dismissed.

On appeal to the United States Court of Appeals for the District of Columbia Circuit, a three-judge panel unanimously reversed the lower court decision and remanded the case for further proceedings consistent with their opinion. A petition for rehearing en banc was filed by the petitioners and denied by a divided court.

## SUMMARY OF ARGUMENT

The claim of the widow and her children was denied by the deputy commissioner. The reversal by the United States Court of Appeals for the District of Columbia is in keeping with prior decisions of this Circuit and the views many times expressed by this Honorable Court.

The decisions consistently hold that there must be substantial evidence in the record to support a position taken by a deputy commissioner particularly in denying a claim. It is not enough to enter an order based on isolated facts. This was the position taken by the majority opinion.

Inasmuch as the decision as it presently exists is fully in accord with prior decisions of the United States Court of Appeals for the District of Columbia Circuit and the United States Supreme Court, this petition should be denied.

## ARGUMENT

For the reasons which follow it is respectfully submitted that the District of Columbia Circuit holding is in full accord both with the Supreme Court's decision in *O'Leary* v. *Brown Pacific-Maxon, Inc.*, 340 U.S. 504 and its prior decision in *Friend* v. *Britton*, 95 U.S. App. D.C. 139, 141, 220 F. 2d 820, 822. The present decision is in no way in conflict with any decision of this Court. Rather, it is harmonious with the underlying principles of the cases as to which petitioner says a conflict exists.

The criteria used under these circumstances is set forth in *O'Leary, supra*:

> "... The standard, therefore, is that discussed in *Universal Camera Corp.* v. *National Labor Rela-*

*tions Board,* 340 U.S. 474, 71 S. Ct. 456. It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole . . ."

The guide in determining issues raised in any claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 901; D. C. Code Sec. 36-501 (1961); is found in section 920:

Presumptions

"In any proceeding for the enforcement of a claim for compensation under this Act, it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act . . ."

Recognizing the fact that in order to enter an award or deny a claim, the findings of fact by the deputy commissioner must be supported by "substantial evidence" the United States District Court for the District of Columbia Circuit stated:

"Our task is to ascertain whether the Deputy Commissioner's findings are supported by substantial evidence upon the record considered as a whole . . . The reviewing court will not sustain the administrative findings merely because they are substantiated by some isolated evidence. Our review must also take account of the settled rule that the Act is to be construed with a view to its beneficent purposes. Doubts, including the factural, are to be resolved in favor of the employee or his dependent family." *Friend* v. *Britton,* 95 U.S. App. D.C. 139, 141, 220 F. 2d 820, 822.

The petitioners submit that the Court of Appeals flagrantly invaded the fact-finding function of an administrative body. The respondents respectfully suggest that there was no such invasion and that in fact to have allowed the decision of the deputy commissioner to stand, would have been a gross miscarriage of justice and a total disregard for the purpose and intent of workmen's compensation law.

A brief look at the record adduced at the hearing of this claim is ample proof that the deputy commissioner's findings of fact were not supported by substantial evidence upon the record considered as a whole.

The decedent's widow testified that her husband complained all the time that the job was too hard and that the work he was doing was too much for him. (R. 8, 10)

The operator of the rig Mr. Vinson was driving stated that it was hard to steer, especially in this case, since the counter-weight was over the cab and that when a tight turn was being made assistance was required. On different occasions he had seen at least two employees help in turning the rig. (R. 23, 24, 33, 34, 38)

The total weight of the crane was 68,000 pounds and it had no power steering. (R. 140, 143)

The rig was still moving at the time of Mr. Vinson's death and had to be stopped by a fellow worker before he was taken out of the truck. (R. 42)

A fellow employee had suggested to Vinson that he get a lighter job because it was just too much for a man his age and it took a young man with a lot of muscle power to drive it. (R. 50)

A witness who succeeded Vinson as operator of the truck testified it was the hardest rig he had operated and that although he was a young man he needed help to steer a number of times. (R. 189, 190, 194)

The specialists in cardiology both testified that strenuous physical effort could and probably did cause coronary insufficiencies. There was no conflict in medical testimony. The difference was in the facts given on which their opinion was based. (R. 96, 177)

The record appears quite inconsistent with the findings of fact made by the deputy commissioner. The respondents submit the decision of the United States Court of Appeals for the District of Columbia Circuit is a just and proper one based on the foregoing facts.

It is interesting to note that in the majority of cases relied on by the petitioners an award had been entered in favor of the claimant and appeals had been taken to set aside the award. (See: *U. S. Fidelity & Guaranty* v. *Britton*, 88 U.S. App. D.C. 135; 255 F. 2d 544; *Liberty Mutual Insurance Co.* v. *Britton*, 100 U.S. App. D.C. 236, 243 F. 2d 659.)

In *Vendemia* v. *Christaldi*, 221 F. 2d 103; (1955), the Court of Appeals in an unanimous decision remanded to the Deputy Commissioner who had denied widow's benefits in a heart case whose facts were that the decedent was "about 50 years of age and apparently enjoyed good health;" on the day of his death, "he suddenly and unexpectedly suffered a severe attack accompanied by pain in the chest" after lunch, which followed several hours of carrying iron bars up 40 steps from a basement to a second floor. After eating lunch, the employee complained of chest pain, took

a drink of water, then another, went to the cab of a truck where he lay down and was later found dead.

The Court of Appeals said:

> "We have held that the occurrence of an injury in the course of employment strengthens the presumption that it arises out of the employment, with doubts resolved in the claimant's favor. (*Hartford Accident & Indemnity Co.* v. *Cardillo*. 72 App. D.C. 52, 54, 112, F. 2d 11, 13, *certiorari denied*, 310 U.S. 649, 60 S. Ct. 1100, 84 L. Ed. 1415. And we have also held that where death in the course of employment is due to an illness which has taken a sudden and unusual turn for the worse, not shown by substantial evidence to be unrelated to the employment, the statutory presumption makes the death compensable." *Robinson* v. *Bradshaw*, 92 U.S. App. D.C. 216, 206 F. 2d 435, *certiorari denied*, 346 U.S. 899, 74 S. Ct. 226, 98 L. Ed. 400.

The petitioner alleges that there was absolutely no evidence in the record that the employee was engaged in any activity when he died. The record speaks for itself. The uncontradicted testimony from the decedent's foreman on the day of his death was that Mr. Vinson was backing the truck crane into a difficult position and making a sharp turn at the same time. (R. 77) The foreman further testified that they were maneuvering and backing it into a very tight and difficult spot at the time of Mr. Vinson's death. (R. 77)

This testimony together with additional testimony previously mentioned would certainly support the respondents position that Mr. Vinson was engaged in strenuous activity and as such his death was caused by his work. The finding to the contrary by the deputy commissioner was unsupported by substantial evidence.

To deny this petition and allow the opinion of the Court of Appeals to remain would in no conceivable way render the fact-finding powers of the Deputy Commissioner negatory. On the contrary, it would serve to re-emphasize the necessity to apply the Longshoremen's and Harbor Workers' Compensation Act according to the letter and spirit of the law.

The respondents pray, therefore, that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit be denied.

MARTIN E. GEREL
925-15th Street, N. W.
Washington 5, D. C.
*Attorney for Respondents*

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16582

MADGE VINSON, surviving wife, ET AL., *Appellants*

v.

CHARLES EINBINDER, Deputy Commissioner, Bureau of Employees' Compensation, ET AL., *Appellees*

Appeal from the United States District Court for the District of Columbia

Decided June 14, 1962

*Mr. Martin E. Gerel*, with whom *Messrs. Lee C. Ashcraft* and *Joseph H. Koonz, Jr.*, were on the brief, for appellants.

*Mr. Herbert P. Miller*, Assistant Solicitor, Department of Labor, with whom *Messrs. Charles Donahue*, Solicitor, Department of Labor, *David C. Acheson*, United States Attorney, and *Nathan J. Paulson*, Assistant United States Attorney, were on the brief, for appellee Einbinder.

*Mr. M. S. Mazzuchi* for appellees Aetna Casualty & Surety Company and McCloskey Enterprises, Inc.

Before EDGERTON, BAZELON and WASHINGTON, *Circuit Judges.*

EDGERTON, *Circuit Judge:* This is a workman's compensation case. 44 STAT. 1424, 33 U.S.C. § 901; 45 STAT. 600, D.C. Code § 36-501 (1961).

On July 7, 1959, Henry Vinson, was "driving and backing" his employer's truck "in various positions", on the construction site of a new House Office building, when he slumped over in the cab of the truck and died instantly of coronary insufficiency and coronary sclerosis. He had been driving and occasionally backing for 1½ to 2½ hours. A crane was mounted on the truck. The weight of the

whole was about 68,000 pounds (34 tons). The truck did not have power steering.

Though the work Vinson was doing when he died was, as the Deputy Commissioner found, a normal part of his job, the Deputy Commissioner denied compensation to Vinson's widow and children. He found that Vinson "was not subjected to heavy physical strain" and that death "did not result from injury arising out of and in the course of the employment". There is no substantial support in the record for these findings. The District Court therefore erred in granting summary judgment for the appellees in this suit by the appellants to set aside the order denying compensation.

> "Our task is to ascertain whether the Deputy Commissioner's findings are supported by substantial evidence upon the record considered as a whole . . . The reviewing court will not sustain the administrative findings merely because they are substantiated by some isolated evidence. Our review must also take account of the settled rule that the Act is to be construed with a view to its beneficent purposes. Doubts, including the factual, are to be resolved in favor of the employee or his dependent family." *Friend* v. *Britton*, 95 U.S. App. D.C. 139, 141, 220 F. 2d 820, 822.

Anyone who distinctly remembers turning and backing an ordinary car, without power steering, when the car was moving slowing, knows it was hard work. Obviously it would have been harder if the car had weighed 34 tons. If there were no evidence in the present record that driving and backing 34 tons of truck and crane, without power steering, on a construction site, was strenuous work, we might perhaps take judicial notice of the fact. But there is ample evidence.

A fellow employee of Vinson testified that moving the steering wheel of the truck was "hard labor . . . very hard.

A hard maneuver. . . . I know of many time I reached up and actually helped him pull the wheel around." A heavy "counterweight" was usually over the rear wheels of the truck but was over the front wheels when Vinson died. the operator of the crane on the truck testified that this position of the counterweight made steering hard for the truck driver and that sometimes "it would take two people [to] turn the wheel. . . . When you make a tight turn you need all the help you can get." A foreman testified that when Vinson died he was "maneuvering and backing in to a very tight and difficult spot." The fellow employee had suggested to Vinson that he "get a lighter job . . . because it was just too much for a man his age and it took a young man with a lot of muscle power to drive it." He made this suggestion "watching him sweat and try to turn that rig around, trying to get it back into places and stuff like that . . . . Because I seen it was hard work for him." Vinson himself had talked about getting an easier job "because it was pretty hard to steer, especially in that particular position." Shortly before Vinson died, as on earlier occasions, he had been helped in turning the wheel. There is no suggestion he was being helped when he died.

A witness who succeeded Vinson as operator of the truck testified that it was "quite hard" to steer and that he needed help a "number of times". He undertook to explain this by saying that "with the anchor bolts in the positions that they were in accordance with the H beams, you have to back in between the H beams and the anchor bolts being in the way, . . . you have to stop, turn the wheel while sitting still, which is a lot harder to steer than it is if you are moving, and to miss these anchor bolts, you have to move the wheel as far as possible to clear these bolts and to get back in between the H beams. And it is quite a strain."[1]

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[1] As this witness was the last, the medical witnesses did not have the benefit of his testimony.

One witness who had operated a similar "rig" but not this one thought "extraordinary strength" was not required. Another such witness thought this truck was no more difficult to manage than any other truck with manual steering but "all truck driving is a manual operation and it is hard work".

Dr. Ethridge, a specialist in cardiology, concluded from the autopsy report that Vinson had a pre-existing arteriosclerosis. He thought the work Vinson "was performing was competent to precipitate, to accelerate an arteriosclerotic condition to the point where it causes death from coronary insufficiency, secondary to sclerosis." "Strenuous physical effort" could, and probably did, cause Vinson's death. Sometimes, this exertion, physical exertion, causes no difficulty and other times it could cause either death or a heart attack . . . and it is often very difficult to know why on a particular day a certain degree of effort produces a lot of trouble—I mean, patients end up in the hospital because they have difficulty or even die, and on another day seemingly might have done something similar without difficulty."

Dr. Walsh, another specialist in cardiology, gave it as his "conclusion that there was no evidence that there was a relationship between his work and his death", but he based this conclusion on a belief that there was no "definite evidence . . . as to whether this man at the time that he died was engaged in extra strenuous activity . . . ." No one who knew the record could have entertained such a belief. He recognized that if "one was doing something very strenuous, something unusual, then we would say, or I would say it was probably that there was a relationship between actually an individual's sudden death due to acute coronary insufficiency and this unusual effort." He recognized that "Certainly the job must have been at times strenuous if it took two men to turn the wheel of the truck. That would be obvious to everyone." Since Vin-

son was "maneuvering and backing in to a very tight and difficult spot" when he died, it seems clear that this was one of the times when his job was very strenuous. He was doing alone the sort of thing it sometimes took two men to do.

The judgment is reversed and the case remanded for further proceedings consistent with this opinion.

*Reversed and remanded.*